

**REMARKS**

The present Office Action addresses claims 1-12 and 14-22, rejecting claims 8-12, 15, 16, and 18-22 as being anticipated by Kuslich (U.S. Patent No. 5,571,189). Applicant notes with appreciation the Examiner's indication that claims 1-7, 14 and 17 contain allowable subject matter, and would be allowed if rewritten in independent form to include all of the limitations of the base claim and any intervening claims. Applicant traverses the rejection, amends claim 21, and cancels claim 22.

By this amendment, claim 21 is amended to recite a therapeutic or prophylactic device for treating a spinal disc annulus having an aperture, the device comprising a biocompatible material for placement in and across the aperture such that said material forms a bridge providing a platform for a traverse of fibroblasts or other normal cells of repair existing in and around the various layers of the spinal disc annulus, the device having means for acute securement of said device to said disc annulus. Support for these limitations can be found throughout the specification and specifically at paragraph nos. [045], [046], [048], and [059] to [061] of the publication of this application, or U.S. Publication No. 2002/0123807. The cited paragraphs disclose the use of various fixation devices for acute securement of the therapeutic or prophylactic device to the annulus. Accordingly, no new matter is added by these amendments.

Applicants respectfully request reconsideration and withdrawal of all of the pending rejections in view of the amendments and the following remarks.

### **The Prior Art Rejections**

The Examiner rejects claims 8-12, 15, 16, and 18-22 under 35 U.S.C. §102(b) as being anticipated by Kuslich. For the following reasons, Applicant requests reconsideration and withdrawal of the rejection.

#### **Rejection under 35 U.S.C. § 102(b) over Kuslich**

As amended, independent claim 21 now requires that the therapeutic or prophylactic device include means for acute securement of the device to the spinal disc annulus. These limitations are neither taught nor suggested by Kuslich. Applicant does not agree with the Examiner's suggestion that a portion of the Kuslich device would inherently form an annular platform for the traverse of fibroblasts or other normal cells of repair, and respectfully submit that this suggestion is a somewhat strained reading of the reference and would simply not be a conclusion drawn by one of ordinary skill in the art. Notwithstanding, the following arguments do not require resolution of this point for allowance of the case, but Applicant reserves the right to present relevant evidence or arguments at a later date if necessary.

Kuslich cannot support a rejection of the present claims. First, Kuslich does not disclose or suggest a device for treating a spinal disc annulus at all. In fact, Kuslich does not teach anywhere that the implant device **40** referenced by the Examiner's Office Action is ever used to treat the disc annulus. Second, and more importantly, nowhere does Kuslich teach that his fusion device, including the equatorial band **42** cited by the Examiner in her rejection, includes any means whatsoever for acute securement of the device to the disc annulus, as is required of the claimed invention.

Kuslich's device **40**, which is essentially a fillable fusion-promoting bag for stabilization of the spine segment, has an equatorial band **42**, and while that band is located in the disc after excision of tissue and expansion of the device **40** by filling with material, there are no securement steps or elements disclosed or suggested by Kuslich for acute securement of the equatorial band **42**, or any other portion of the device **40** to the spinal disc annulus. Accordingly, since Kuslich fails to disclose each and every limitation of the claimed invention, Applicant respectfully requests reconsideration and withdrawal of the rejections of claims 8-12, 15, 16 and 18-21 over Kuslich in view of the amendment.

**Conclusion**

In view of the foregoing amendments and remarks, Applicant respectfully requests reconsideration and reexamination of this application and the timely allowance of the pending claims. Please grant any extensions of time required to enter this response and charge any additional required fees to our deposit account 06-0916.

Respectfully submitted,

FINNEGAN, HENDERSON, FARABOW,  
GARRETT & DUNNER, L.L.P.

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By:   
Eric P. Raciti  
Reg. No. 41,475